

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration Without
a Permit of the Cross-Section of
Byrne Lake by Howard Mesenbrink and
Don Ascheman.

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on October 7 and October 8, 1991 at the Swift County Law Enforcement Center, Benson, Minnesota. A site visit was conducted on the afternoon of October 7.

Appearing on behalf of the Department of Natural Resources (hereinafter "DNR") was Jerilyn K. Aune, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155. Howard Mesenbrink, 920 South Highway 104, Glenwood, Minnesota 56334, and Don Ascheman, RR2, Box 78, Hancock, Minnesota 56244, (hereinafter "the Landowners" or "Appellants") appeared on their own behalf at the hearing. Mr. Mesenbrink was not present for the start of the hearing. When he appeared, he was given the opportunity to become familiar with the evidence that had already been put into the hearing record. David C. McLaughlin, Pfleuger, Kunz & McLaughlin, P.A., Attorneys at Law, 212 Second Street N.W., Ortonville, Minnesota 56278 subsequently submitted Briefs and an Application to Reopen the hearing record on behalf of the Landowners.

The record in this matter closed on April 14, 1992, upon issuance of a Letter Order denying the Landowners' Application to Reopen the record.

This Report is a recommendation, not a final decision. The Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Rodney Sando, Commissioner, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155-4001, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Whether Howard Mesenbrink and Don Ascherman have altered the cross-section of Byrne Lake without a permit from the Commissioner of Natural Resources, and if so, whether Mr. Mesenbrink and Mr. Ascherman should be required to take affirmative action to restore the lake basin to its former condition.

Based on all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Byrne Lake (76-115W) is located in Section 1, Township 122 North, Range 41 West (Fairfield) and Section 6, Township 122 North, Range 42 West (Tara), in Swift County, Minnesota. As originally identified, Byrne Lake consisted of two basins, a southern basin of approximately 20 acres in a rectangle and a longer basin located to the northwest of approximately 65 acres. The DNR has identified the northwestern basin as a Type 4 wetland, as that classification is defined by the U.S. Fish and Wildlife Service. DNR Exhibits 3 and 7. The southern basin was since designated as a separate wetland and is not included in this proceeding. From the southeast, the northwest basin of Byrne Lake extends northwest over Mr. Ascheman's land and runs out natural on land owned by Mr. Mesenbrink.

y

2. Near the furthest point northwest on Byrne Lake, water flowing in Judicial Ditch No. 2 (hereinafter J.D.2) crosses underneath the township road which forms the boundary between Stevens County and Swift County. At that location, J.D.2 enters onto Mr. Mesenbrink's property and changes its flow from south to west, running south of and parallel to the County-line road. Just south of J.D.2 is an earthen berm, which runs parallel to J.D.2 and separates the road and J.D.2 from the land containing Byrne Lake. Attachment A. The water flow from Stevens County to Swift County occurs through a 36" culvert flowing from north to south. J.D.2 drains farmland for several miles to the north, east, and to a small extent, south. J.D.2 flows from east to west between the berm on its south and the County-line road on its north. Approximately 350 feet west of J.D.2's entry onto Mr. Mesenbrink's land, an 1811 culvert was placed in the berm as part of the ditch system prior to 1963. This culvert was originally placed to carry overflow from Byrne Lake into J.D.2. Without that culvert, overflow from Byrne Lake would flood cultivated fields of both Landowners. As originally installed, any drainage overloading J.D.2 can "back into" Byrne Lake. This reserve capacity reduces the likelihood of flooding downstream in J.D.2 and in the Pomme de Terre River.

3. Historically, Byrne Lake consisted of 88 acres. With the designation of the southern basin as a separate wetland, Byrne Lake presently consists of 65 acres. When water is standing in Byrne Lake it attains a depth of up to three feet of water. At the time of the hearing, the entire lake basin was empty of water. The northern basin has been used for cultivation since 1987.

4. Byrne Lake had been the subject of a prior action taken against Howard Mesenbrink and Fred Ascheman (Don Ascheman's father). In that prior action, a criminal complaint for draining Byrne Lake was dismissed upon agreement to restore Byrne Lake to its prior condition. The criminal complaint was filed on the basis of ditching performed in 1961. As part of the case brought against Mr. Mesenbrink and Fred Ascheman, a survey was completed in 1963 of the northwestern end of Byrne Lake and a culvert was placed in the berm between J.D.2 and the portion of Mr. Mesenbrink's land lying immediately north of the Byrne Lake basin. The survey concluded that the ordinary high water level (hereinafter "OHWL") of Byrne Lake is 1106.0 feet above Mean Sea Level (hereinafter 'IMSLII'). The conclusion was reached

based on the contours of the lake basin, evidence of aquatic vegetation, and the evidence of definable banks around the lake. DNR Exhibit 36. On January 27, 1964, the DNR certified that restoration of the basin was completed.

5. Aerial photographs taken of Byrne Lake from 1950 through 1989 show clearly defined banks to the Byrne Lake basin. DNR Exhibits 10, 11, 12 and 13. Those photographs taken before 1983 show Byrne Lake holding water at varying levels, but not beyond the 1106 MSL contour on DNR surveys. Photographs taken after 1983 show outlines of the dry banks of Byrne Lake. DNR Exhibits 15 and 23.

6. In 1972, Roy W. Holmquist, Attorney at Law, inquired of the DNR as to the status of Byrne Lake by letter on behalf of the Landowners. Lawrence D. Seymour, Supervisor of the DNR Regulations Unit, responded in a letter dated November 3, 1972. Mr. Seymour informed Mr. Holmquist that Byrne Lake was listed on the Inventory of Minnesota Lakes; that the lake is considered a public water; and that drainage of Byrne Lake would require a permit from the DNR. Mr. Seymour also volunteered the opinion that the DNR is "of course, opposed to drainage of this public water." DNR Exhibit 6. A permit application form was enclosed with the letter. There is no evidence that a permit was applied for in 1972.

7. A Data Inventory Sheet for Byrne Lake was prepared between 1979 and 1981 by the DNR. DNR Exhibit 7. This document was prepared to identify protected waters, including ubi@ waters and wetlands, and establish a preliminary inventory. The document indicates that Byrne Lake is a type 4 wetland, as defined by the U.S. Fish and Wildlife Service. The Sheet also states that Byrne Lake is an:

Excellent waterfowl, upland game + big game habitat. 1968 photo shows muskrat houses visible.

DNR Exhibit 7.

8. The Swift County Hearings Unit concluded in March, 1981 that Byrne Lake was not a wetland. That conclusion was reversed on appeal by Swift County District Court Judge John C. Lindstrom in an Order dated March 25, 1985. By operation of that Order, Byrne Lake was placed into the inventory of public waters as a type 4 wetland. No further appeal was taken from Judge Lindstrom's Order.

9. In 1983, while the appeal of the Swift County Hearings Unit decision was ongoing, the Landowners reestablished the ditch from the natural runout point of Byrne Lake to the 18" culvert leading to J.D.2. The ditch followed a natural contour of the land approximately 825 feet to establish a run out

point at an elevation of approximately 1104.4 MSL. The ditch drained Byrne Lake to that level, down from the OHWL of 1106 MSL. The Landowners did not have a permit from the DNR to perform this drainage.

10. Since at least the time J.D.2 was last cleaned out in 1981, the Landowners have been levied upon by the joint ditch authority for drainage into J.D.2 from their land, including the land under Byrne Lake. The DNR has supported the Landowners in their efforts to reduce their assessed ditch tax by excluding the land under Byrne Lake. At a meeting on January 16, 1987, the

ditch authority informed the Landowners that the ditch authority would consider reducing their assessment if the Landowners were refused a permit to drain Byrne Lake.

11. On February 6, 1987, the Landowners submitted a permit application to drain Byrne Lake. DNR Exhibit 16. Thomas Orr, Swift County Soil and Water District Technician, and Tom Anderson, Swift County Parks and Drainage Supervisor, commented on the effects of the proposed drainage as part of the application process. The drainage would have run into J.D.2. The Landowners' application was filled out in the DNR Appleton Office with the assistance of David Soehren, a DNR employee.

12. The Landowners were informed of the options of entering the Water Bank program, fee acquisition by the State of the land under Byrne Lake, or assigning easements to any one of several entities, in lieu of draining the lake. This information was given to the Landowners within sixty days of the date of the application to drain Byrne Lake. The Landowners expressed their lack of interest in any of those programs to the DNR before April 1, 1987.

13. The DNR formally denied the Landowners' application to drain Byrne Lake in a written decision dated April 1, 1987, and mailed to the Landowners, the ditch authority, two Legislators, and several local public bodies. DNR Exhibit 27. No appeal was taken from this decision.

14. In October of 1987, the Landowners used a tractor and scraper to construct a ditch running over 2000 feet from the J.D.2 berm into the Byrne Lake basin. From within the lakebed, the ditch runs northwest along the line of the 1963 ditch until the 1963 ditch curves south along the contour. The 1987 ditch continues northwest in a straight line, bisecting the contour followed by the 1963 ditch and rejoining the 1963 ditch at that point. Attachment A. From there the 1987 ditch follows the line of the 1963 ditch to the 18" culvert. The 1987 ditch established a run out point of 1103.1 MSL from Byrne Lake into J.D.2.

15. The 1811 culvert provided drainage at approximately 1104 MSL in 1963. In 1987, the lowest point on the 18" culvert was surveyed at 1102.5. DNR Exhibit 38. A flap gate has been installed on the 18" culvert on the J.D.2 end. The flap gate opens to allow water to flow from the Byrne Lake side of the culvert, but closes to prevent water from flowing into Byrne Lake from J.D.2. This flap gate severely reduces the reserve water retention capacity of Byrne Lake and increases the risk of flooding on the Pomme de Terre River.

16. As a result of the drainage in 1983 and 1987, Byrne Lake no longer has standing water within its definable banks.

17. On June 9, 1988, Ronald Harnack, Administrator of the Permits and Land Use Section, Division of Waters of the DNR, issued Findings of Fact and an Order determining that the cross-section of Byrne Lake had been altered and

requiring that the Landowners restore it:

[T]o the condition to which it existed prior to the
aforementioned ditching. Such restoration shall consist of
constructing a permanent water control structure within the
ditch in the vicinity of the private crossing located at Station

30+56 of the attached copy of D.O.W. Survey Map No. D-1481. The minimum runout elevation for this control structure shall not be less than 1106.0 feet above Sea Level (NGVD, 1929).

DNR Exhibit 20, I[B.

18. On August 26, 1991, Ronald Nargang, Deputy Commissioner of Natural Resources issued an Order and Notice of Hearing setting this matter for hearing on October 7, 1991, in the Community Room of the County Law Enforcement Center in Benson, Minnesota.

19. On August 27, 1991, the Order and Notice of Hearing was served upon the Landowners and a number of federal, state, and local officials by U.S. Mail.

20. A copy of the Order and Notice of Hearing was published in The Appleton Press for two successive weeks, on September 4, 1991, and September 11, 1991. DNR Exhibit 1. The Order and Notice of Hearing was also published in the EQB Monitor, Volume 16, Number 6, September 16, 1991. DNR Exhibit 2.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. All relevant substantive and procedural requirements of law and rule have been fulfilled to confer jurisdiction over this matter upon the Commissioner and the Administrative Law Judge pursuant to Minn. Stat. 14.57 and 103G.251.

2. The basin of Byrne Lake (76-115W) is a "waterbasin" within the meaning of Minn. Stat. 103G.005, subd. 16 (1990).

3. By Order of Judge John C. Lindstrom dated March 25, 1985, Byrne Lake is classified as a "wetland" under Minn. Stat. 105.37, subd. 15.

4. Byrne Lake is a "public waters wetland" within the meaning of Minn. Stat. 103G.005, subd. 18 (1991). "Public waters wetland" is the successor definition to "wetland" as classified by Judge Lindstrom in 1985.

5. Prior to 1983, the contents of Byrne Lake were "waters of the state" as defined by Minn. Stat. 105.37, subd. 7 (1982). The Byrne Lake basin met the definition of "waterbasin" as determined by Minn. Stat. 105.37, subd. 9 (1982). The wildlife habitat and flood control aspects of Byrne Lake identified in DNR Exhibit 7 existed up to 1983 and were "beneficial public

purposes" as defined by Minn. Stat. 105.37, subd. 6 (1982).

6. By operation of Minn. Stat. 103G.005, subd. 15(a)(11),
Byrne Lake
is a public water.

7. Byrne Lake has been properly designated a protected public water
pursuant to the DNR's inventory and classification procedures.

8. The DNR has the burden of proving by a preponderance of the evidence that any alteration of the cross-section of Byrne Lake required a permit from the Commissioner of Natural Resources and that Howard Mesenbrink and Don Ascheman have engaged in the unlawful alteration of Byrne Lake's cross-section.

9. The DNR has proven that Howard Mesenbrink and Don Ascheman have engaged in the unlawful alteration of Byrne Lake and that any such activity required a permit from the Commissioner.

10. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the Memorandum are adopted and incorporated herein as Conclusions.

11. Any of the foregoing Findings of Fact properly considered Conclusions of Law are hereby adopted as such.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMEN ATION

IT IS HEREBY RECOMMENDED: That the Commissioner issue an Order requiring that Howard Mesenbrink and Don Ascheman install a water control structure in the ditch in the vicinity of Station 30+56 of D.O.W. Survey Map No. D-1481 so that the minimum runout elevation for this control structure shall not be less than 1106.0 feet above Sea Level and restore Byrne Lake to the condition of the Lake in 1964. It is recommended that the flap gate be removed from the 18" culvert entering J.D.2. It is further recommended that any other parts of the June 9, 1988 Order by Ronald Harnack which are deemed needed to carry out the purposes of the DNR in restoring Byrne Lake should also be made a part of the Commissioner's order.

Dated: April 1992.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded. No Transcript.
Seven Cassettes: Nos. 10,608 to
10,613 and 10,624.

MEMORANDUM

The evidence in this matter is mostly undisputed. The Landowners acknowledge ditching in Byrne Lake in both 1983 and 1987. They admit that no permit was issued by the DNR to allow this activity. At the hearing, the Landowners appeared to rely upon the assessments from the joint ditch authority to justify draining Byrne Lake into J.D.2. No authority has been cited to support that position. The DNR witnesses with personal knowledge of the Landowners' permit application testified that the application was made with the expectation that it would be denied and the denial then used as a basis to lower the ditch assessments levied against the Landowners. Every document which comments on the permit application is consistent with this explanation of the reason for requesting the permit. The Landowners did not dispute this testimony and emphasized the unfairness of the drainage assessment. That unfairness has been negated in part by the ditching done by the Landowners. Once the illegal drainage has been eliminated, the Landowners may wish to consider appealing further ditch assessments.

The Landowners also base their actions on Byrne Lake's being dry in 1987. Minn. Stat. 105.391, subd. 10 expressly authorizes use of wetlands for cropland during drought periods "if there is no construction of dikes, ditches, tile lines or buildings, and the agricultural use does not result in the drainage of the wetlands or public waters." In this case, a ditch was constructed and drainage was performed. Once a ditch has been excavated to drain a wetlands the owner cannot rely upon the land being dry to justify the construction.

The Landowners vigorously disputed the DNR's charge that the 18" culvert connecting the outflow of Byrne Lake and J.D.2 was lowered. Photographs of the culvert in 1983 and in 1987 show unmistakable signs of disturbance. DNR Exhibit 23. Unbroken vegetation covered the berm around the culvert in 1983. Vehicle tracks were worn into the berm on top, with vegetation growing between the wheel ruts. In 1987, the vegetation around the culvert and on top of the berm is missing, with bare dirt present in the berm for several feet on either side of the culvert, extending on a line with the culvert through the berm. The vegetation was undisturbed on the Byrne Lake side of the berm. The DNR witnesses who visited the site in 1987 testified that the lowering of the culvert was "obvious." In photographs, the culvert appears to be further below the top of the berm in 1987 than the culvert was in 1983, with no change in the height of the berm at that point. DNR Exhibit 23. The survey

introduced into the record indicated that the culvert was lower in 1987 than in 1963.

Due to the method suggested to remedy the illegal drainage, the position of the culvert is not critical to any Finding, Conclusion, or Recommendation in this Report. The topography of the Byrne Lake basin is such that re-establishing the 1106 MSL contour by blocking the 1987 ditch is adequate to return Byrne Lake to its pre-existing OHWL. The foregoing recitation has been set forward because the culvert, in its current location and without a flap gate, would cause significant backflow problems for the Landowners if certain conditions are present on J.D.2. At the culvert's present level, water from J.D.2 would flow onto the Landowners' property more easily than from the 1983 level. Since raising the culvert would require a permit, an exception filed to this Report requesting the culvert be raised to the 1963 level, or an

additional Finding by the Commissioner requiring that change could bring the culvert to its 1963 level of 1104 MSL and prevent unnecessary hardship for the Landowners. The flap gate constitutes an alteration which could affect the normal backflow of water from J.D.2 into the Byrne Lake basin, although only under extremely high water conditions. Since no permit was issued to install the flap gate, it must be removed.

After the hearing in this matter, counsel for the Landowners made an Application to Reopen the hearing record. This application was treated as a motion for rehearing on the issues presented. The motion was denied by letter on April 14, 1992, and that letter stated that the reasons for that denial would be contained in this Report.

Two theories have been presented to justify reopening this case. First, the Landowners argue that Minn. Stat. 103G.221, subd. 3 authorizes drainage of Byrne Lake due to DNR's failure to make an offer of inclusion in the State Water Bank program or offer to purchase the land under Minn. Stat. 97A.145, or offer some other easement, lease, or conservation program. The evidence in the record shows that the permit was originally sought to provide a basis for appeal of the Landowners' ditch assessments and that all parties believed the permit would be denied. This is shown in both testimony and DNR Exhibits 17, 18, and 26. Exhibit 26, a letter dated May 27, 1986, from David Soehren, DNR Area Wildlife Manager, addressed to Don Ascheman states:

The impression I got from you at the time of your visit was that you would rather be exempted from your assessments [sic] than persue [sic] the legal battle that would result from attempted drainage of the wetland.

My suggestion to you, Don, is to submit the enclosed application for a permit to drain Byrne Lake (76-115W). In all likelihood, this application will result in a denial of permit. You then will have a better argument to contest your assessed benefits with the Joint Ditch Authority. You will then be subject to less criticism from your neighbors because you can show that you tried to drain the wetland legally.

When your application is received, the State has sixty(60) days in which to notify you of a denial and extend the range of offers I listed above.

The DNR has supported Appellants' attempts to reduce their ditch

assessments. DNR Exhibit 25. The hearing record also indicates that the Landowners were offered the statutorily required options during the 60 day period. DNR Exhibit 27 and Soehren Testimony (Tape 3, 4445 and 5350). An inquiry was initiated into whether the Nature Conservancy would purchase the land. Soehren Testimony (Tape 3, 3800). While no document indicates the Landowners' response to these offers, testimony indicates that there was no interest in the State Water Bank or any other transfer of land rights.

Soehren Testimony (Tape 3, 5350). At no point in the hearing did the Landowners object to, or dispute the veracity of these statements.

Ironically, the first Exhibit proposed to be included in the reopened hearing record is the March 2, 1987 letter which indicates that Mr. Mesenbrink can sell his portion of Byrne Lake to the DNR if he so desires. That letter accompanies the form letter setting out how a wetland is determined to be eligible for financial compensation and an application form for Water Bank eligibility. The only form identified as included in the mailing and not included in proposed Exhibit A is the blank statement that the landowner is not interested in the Waterbank program. A valid inference from that form's absence is that the form was executed by Mr. Mesenbrink and returned to the DNR.

In addition to the State Water Bank advisory in proposed Exhibit A, Judge Lindstrom's Order of March 25, 1985 (DNR Exhibit 4), the Local Unit of Government Comment on the 1987 Permit Application (DNR Exhibit 17), and the Order of the Commissioner, dated April 1, 1987, denying the application (DNR Exhibit 27) all state that the Water Bank program or other compensated transfers of rights are available. The Order of the Commissioner affirmatively found that: 1) the DNR offered those options to the Landowners; 2) the Landowners informed the DNR that they were not interested in those options; and 3) the Landowners failed to file the information required to determine whether Byrne Lake was eligible for compensation under any of the DNR's programs. That Order was not appealed.

Failure to file information to determine the eligibility of the public water for inclusion in the State Water Bank is important only in the event that a Finding is made that the DNR failed to make the offers listed in Minn. Stat. 103G.221, subd. 3. The record is replete with direct and circumstantial evidence that the DNR made those offers and the Judge has found accordingly in this matter. Reopening the record to receive proposed Exhibit A and supporting testimony would only add to the weight of evidence showing the Landowners had been informed of their rights to a compensated transfer of land within 60 days of the permit application.

Even if the Judge were to find that the DNR had not made the offers listed in Minn. Stat. 103G.221, subd. 2, the result would be the same. The Landowners argue that the applicable statute states:

Subd. 2. Drainage of Wetlands for Cropland. (a) Wetlands that are lawful, feasible, and practical to drain and if drained would provide high quality cropland and that is the projected land use, as determined by the commissioner, may be drained without a permit and without replacement of wetlands of equal or greater public value if the commissioner does not choose, within 60 days of receiving an application for a permit to drain

the wetlands to:

- (1) place the wetlands in the state water bank program under section 103F.601; or
- (2) acquire them in fee under section 97A.145.

(b) If the commissioner does not make the offer under paragraph (a), clause (1) or (2), to a person applying for a permit, the wetlands may be drained without a permit.

The foregoing language was added to Minn. Stat. 105.391, subd. 3 (later recodified as Minn. Stat. 103G.221, subd. 2) by operation of Minn. Laws 1987, Chapter 357, Section 20 and Chapter 229, Article 2, Section 1. This language became effective August 1, 1987, after the application had been filed and denied. The statutory language in effect during the application process at issue reads:

Subd. 3. Except as provided below, no public waters or wetlands shall be drained, and no permit authorizing drainage of public waters or wetlands shall be issued, unless the public waters or wetlands being drained are replaced by public waters or wetlands which will have equal or greater public value. However, after a state waterbank program has been established, wetlands which are eligible for inclusion in that program may be drained without a permit and without replacement of wetlands of equal or greater value if the commissioner does not elect, within 60 days of the receipt of an application for a permit to drain the wetlands, to either (1) place the wetlands in the state waterbank program, or (2) acquire it pursuant to section 97A.145, or (3) indemnify the landowner through any other appropriate means, including but not limited to conservation restrictions, easements, leases, or any applicable federal program. The applicant if not offered a choice of the above alternatives, is entitled to drain the wetlands involved.

Minn. Stat. 105.391, subd. 3 (1986)(emphasis added).

The underlined language in the statute is critical to the claim that a landowner is entitled to drain wetlands without a permit. Only wetlands eligible for inclusion in the State Water Bank program are eligible for draining without a permit in the event the Commissioner fails to offer the listed alternatives within 60 days. For land to become eligible for inclusion, the application must contain the proper forms. @ Minn. Rule 6115.1220, subp. 1. Without the forms, the Commissioner could not determine eligibility and properly extend an offer to the Landowners. See Minn. Rule 6115.1220, subp. 2(A) and (B). There is no requirement under the law in effect in April, 1987, that applications for the Water Bank program be included to consider a permit application. If a landowner declines to participate in any alternative program and makes that decision clear to the DNR, the agency is not required to engage in futile paperwork.

In this case, the Landowners made their lack of interest in the State Water Bank program clear to the DNR and they did not make any effort toward determining if their wetlands were eligible for that program. The permit application process was conducted to obtain a basis for relief from a portion of their assessment for J.D.2. No appeal of that assessment was made after the permit was denied. While the reasons for the Landowners' failure to appeal the assessment is not made explicit in the record of this matter, it

may arise from the illegal ditching performed in 1987. It would be difficult for the Landowners to explain why they are entitled to assessment relief when they have used J.D.2 as the outlet to drain Byrne Lake, when the very inability to drain the lake is the basis for the assessment appeal.

The Landowners' failure to file the required forms removed their application from the operation of Minn. Stat. 105.391, subd. 3 (1986), since the eligibility of Byrne Lake for any of the options listed in the statute was never established. Even if the Commissioner had failed to advise the Landowners of the options listed under the statute, the Landowners were not entitled to drain the wetland without a permit.

The Landowners maintain that the hearing record must be reopened to include evidence of the cross-section of Byrne Lake as it existed after ditching performed in 1983. They argue the alteration made in 1983 was done under an existing right and sets the standard to which drainage can be restored. This argument is grounded upon the holding in Department of Natural Resources v. Mahnomen County Hearings Unit, 407 N.W.2d 434 (Minn.App. 1987), rev. denied, August 12, 1987. That decision states:

This section implies that a basin becomes a public water or protected wetland at the time the hearings unit issues its final order making that classification. Before that time, a private owner may ditch a basin because it has not been classified as a public water or wetlands. The statute does not expressly state that any ditching prior to an inventory of the waterbody would be illegal.

Mahnomen County Hearings Unit, 407 N.W.2d at 438.

The quoted language would suggest that the critical issue is the time at which the hearings unit decision classifies the basin. The final decision in the Byrne Lake classification came in Judge Lindstrom's decision of the appeal of the 1981 hearings unit decision. Judge Lindstrom's decision on that appeal came in 1985.

However, the Mahnomen decision itself renders the date of classification issue potentially moot. The Court of Appeals, immediately after the quoted language above, states:

The DNR also failed to show that any of the waters under evaluation would have qualified as a public water under the 1973 or 1976 definitions. If it had argued that these waters fit the definition of public waters under those statutes, its argument regarding the unlawfulness of the drainage would have merit. Absent that evidence, however, it becomes incumbent upon us to review the sufficiency of the evidence based on the condition of the areas at the time of the hearing.

Mahnomen County Hearings Unit, 407 N.W.2d at 438.

The Mahnomen decision did not create an "open season" on wetlands in the inevitable interim period between the passage of the statute in 1979, when the hearing unit system was initiated, and the final decision of the hearing unit, or the final appeal of the hearing unit's decision. It is incorrect to

suggest that drainage of wetlands occurring after the hearing on whether a

geographic feature was a wetland could be used to determine the actual extent of the wetland to be protected. This result would render the statutory system of public water and wetland classification a nullity. The holding of the Mahnomen decision is that legal ditching at the time of the hearing is not made illegal by a finding that the feature is a wetland. Any illegal ditching, whether before or after the finding that the feature is a wetland, is not ratified by the hearing unit's decision.

The hearing record shows clearly that ditching without a permit was illegal on Byrne Lake as early as 1963. The DNR has demonstrated that Byrne Lake met the 1976 definition of public waters through 1983, since Byrne Lake met the criteria for beneficial public use through wildlife habitat and flood control. The only aspect of beneficial public use disputed by the Landowners is the DNR's conclusion that Byrne Lake provided excellent waterfowl habitat. The DNR's conclusion, made between 1979 and 1981, is strongly supported by the presence of a duck blind on the lake bed as late as November 24, 1987. DNR Exhibit 23. This suggests the presence of waterfowl, in addition to that of the upland game (pheasant, grouse) acknowledged by the Landowners as inhabitants of the basin. Since Byrne Lake met the definition of a wetland in 1983, Minn. Stat. 105.42, subd. 1 required a permit for altering the cross-section of Byrne Lake at that time. The ditching performed on Byrne Lake in 1983 was performed without a permit and was not authorized by statute or ratified by the holding in Mahnomen.

Proposed exhibits C through H arose from the period after the application denial on April 1, 1988. The Landowners maintain that these exhibits demonstrate the DNR's continuing failure to meet their statutory obligation to purchase the land underlying Byrne Lake. These proposed exhibits might have been relevant if the Landowners had timely filed the proper forms to determine that the land was eligible for inclusion in the Water Bank program. Since those forms were not filed, no statutory right was infringed by the DNR. Because the denial of the Landowner's permit application was already issued, the actions of the DNR as documented by those proposed exhibits are not relevant. The DNR has the discretion to attempt to settle contested cases. Proposed exhibits C through H, taken most favorably to the Landowners, show only that the DNR has attempted to purchase the property, in lieu of awaiting the outcome of this action. These proposed exhibits do not demonstrate any statutory right to alter the cross-section of Byrne Lake or any violation of the Landowners' due process rights. It is noted that proposed exhibit H, alleging that J.D.2 will not work properly unless the Landowners' ditching is retained, would be relevant only if they had a pre-existing right to drain

Byrne Lake into J.D.2. As found above, the record makes clear that the Landowners have not had such a right since the early 1960's, at the latest. The same reasoning applies to the argument in proposed exhibit G based on the fact that the lake basin land is subject to property tax and ditch assessment.

The Landowners have not demonstrated that any of the evidence proposed to be introduced by reopening the record will support their position in this case. It is either cumulative (proposed Exhibit A), already in the record (proposed Exhibit B), or irrelevant (proposed Exhibits C, D, E, F, G and H). Since the evidence is not needed to arrive at the decision in this case, there is no reason to impose the additional burden of a further hearing on the DNR or its witnesses.

R.C.L.